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Oct 3, 1894

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
Appellant,
vs.
EARL B. COOK,
Appellee.

No. 89

Motion to Dismiss Appeal, and Brief.

E. M. SANFORD,
A. M. STEVENSON,
B. L. CARPENTER,
For Appellee.

IN THE

Supreme Court of the United States.

THE UNITED STATES OF AMERICA
APPELLANT.

vs

EARL B. COE,
APPELLEE.

Motion to Dismiss Appeal.

And now comes Earl B. Coe, the above named Appellee, by his attorneys, and respectfully suggests:

1. The Congress of the United States has no power to confer upon the Supreme Court jurisdiction to entertain an appeal from a decision of the Court of Private Land Claims, the latter tribunal not being vested with judicial power in virtue of any provision of the Constitution.

2. The act creating the Court of Private Land Claims, in prescribing the course of procedure upon appeal, imposes upon the Supreme Court of the United States the exercise of original jurisdiction, contrary to the provisions of the Constitution of the United States.

And thereupon, and because this Court is without jurisdiction to entertain the said supposed appeal, the Appellee moves the dismissal thereof at the cost of the Appellants.

BRIEF IN SUPPORT OF MOTION.

Former decisions of this Court have clearly settled that there are but two classes of Courts that may be created by Congress, in virtue of the powers granted it by the Constitution of the United States. They are defined as constitutional courts, or those created by virtue of Sec. 1 of Art. 3 of the Constitution, and "legislative courts," or those created or authorized by Congress in virtue of the power granted by sub-division 2 of Sec. 3, Art. 4 of the Constitution, "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

As the Act of March 3, 1891, 26 Statutes at Large, 854, establishing the Court of Private Land Claims, provides that the judges thereof shall hold their offices for a term expiring on the 31st day of December, 1895, it is clear that such tribunal is not a constitutional court.

Const. Art. 3, Sec. 1.

American Insurance Co. vs. 356 Bales of Cotton. 1 Pet. 511-546.

Brenner vs. Porter, 9 How. 235-242 et seq.

McAllister vs. United States 141, U. S. 174.

That the Court of Private Land Claims does not fall within the class denominated "legislative courts" would seem to be equally clear inasmuch as Congress derives its power to create such courts or to confer judicial power upon courts created by other legislative bodies solely from that provision of the Constitution hereinbefore referred to, empowering Congress to make rules and regulations respecting the territory belonging to the United States.

Cases cited *supra.*

Clinton vs. Englebrecht, 13 Wall. 434-447.

The purpose of the act creating the Court of Private Land Claims is, as stated in its title. "To provide for the settlement of private land claims in certain States and Territories." No jurisdiction is conferred upon the court by the act to administer the judicial power of the United States in respect of any of their territory or property. The matters committed to it by Congress for adjudication are such as might well have been determined by Congress itself without recourse to judicial agency, in carrying out, in good faith, the provisions of the treaties made with Mexico, by virtue of which this government acquired sovereignty over the territory in which these lands are. Indeed, for many years Congress pursued the policy of hearing and determining these claims for itself. Mr. Justice Field, in his dissenting opinion in the case of the United States vs. The Judges, 3 Wall. 673, uses the following language: "These cases belong to that class of controversies which are properly subjects of administrative regulation and do not become converted into suits in equity because judicial agency is brought in to aid the administrative proceeding. They may be submitted to the entire disposition of a Board of Commissioners without the violation of any principle, just as the California land cases are submitted, in the first instance, to such board for investigation." So in this case: Because the proceedings to determine a controversy before the Court of Private Land Claims takes, by direction of Congress, the form of judicial procedure, it does not follow that the orders of that tribunal made in the progress of a hearing, or its final determination of the matter, is the exercise of the judicial power of the United States.

The language of this court in the case of the United States vs. Ferreiro, 13 How., 40, is applicable to the power conferred upon the Court of Private Land Claims. "It is

nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to land or money under a treaty. A power of this description may constitutionally be conferred on a secretary, as well as on a commissioner, but it is not judicial in either case in the sense in which judicial power is granted by the constitution to the courts of the United States."

As the Court of Private Land Claims is not a court in the sense of having been vested with the judicial power of the United States, it would seem to follow that Congress may not impose upon this Court the exercise of appellate jurisdiction over its decisions.

However much we may disagree with the reasoning and conclusions of Mr. Chief Justice Bartley in his dissenting opinion in Piqua Bank vs. Knoup, 6th Ohio St., 343-391, the folllowing proposition is not to be denied:

"Appellate jurisdiction is not only a continuation of the exercise of the same judicial power which has been executed in the Court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power."

Speaking of the appellate power of this court, Mr. Chief Justice Taney, in the case of Gordon vs. United States, 117, U. S. 698, says:

"The appellate power and jurisdiction are subject to such exceptions and regulations as the Congress shall make, but the appeal is given only from such inferior courts as Congress may ordain and establish to carry into effect the judicial power specifically granted to the United States * * * * And Congress cannot extend the appellate power of this court beyond

the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a commissioner or auditor or any other tribunal exercising only special power under an act of Congress."

U. S. vs. Ritchie, 17 How., 525.

Hayburn's case, 2 Dall. 409.

U. S. vs. Ferreira, 13 How., 30-46.

Re Sanborn 148 U. S., 222.

Grisar vs. McDowell, 6 Wall., 363.

Interstate Commerce Com. vs. Brimson, Opinion of Sup. Ct., May 26, 1894.

In the case of Auditor of State vs. A. T. & S. F. R. Co., 6 Kan. 505, we find a quite accurate statement of our position. "The term, then, 'appellate jurisdiction,' as used in the constitution has some other meaning than that there should be merely an appeal from some decision or act of some officer of the state, and it is this meaning of the term that is to be sought for. In this search we are not left entirely to our own reason for guidance. The constitution of the United Stated contains a clause of similar import which has been the subject of comment and decision by the Supreme Court of the United States, and the substance of their decision is thus stated by Judge Story in his commentaries on the constitution, § 1761: 'The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has already been instituted and acted upon by some other *court* whose judgment or proceedings are to be revised. The appellate jurisdiction

may be exercised in a variety of forms, and, indeed, in any form which the legislature may choose to prescribe, but still the substance must exist before the form can be applied to it. To operate at all, then, under the constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States, it must be by one clothed with judicial authority and acting in a judicial capacity.' This construction of the term represents as well the general views of men as the decisions of courts, and must have been in the minds of those who made it a part of our fundamental law, and must be held in this court as authoritative and binding. See the case of Crane vs. Giles, 3 Kan. 54; ex parte Logan Branch Bank, 1 Ohio St., 432.

"It is not sufficient, then, that there has been a decision, but there must have been a decision 'by a court' 'clothed with judicial authority and acting in a judicial capacity.'"

See also Elliott's App. Proc. §§ 15, 16, 17.

If this appeal is entertained the case is within cognizance of the judicial power of the United States for the first time here; that is original not appellate jurisdiction.

But should the Court be of the opinion that the Court of Private Land Claims is a tribunal administering the judicial power of the United States, and thus a part of its judicial system from which an appeal may be prosecuted to the Supreme Court, then we contend that in prescribing the mode of procedure in this Court upon such appeal Congress has transcended its powers and thus rendered nugatory the clause in the act granting the right of appeal.

By Section 9 of the act creating the court it is provided as follows: "On any such appeal the Supreme court shall re-try the cause, as well the issues of fact as of

law, and may cause testimony to be taken in addition to that given in the court below and may amend the record of the proceedings below as truth and justice may require; and on such retrial and rehearing every question shall be open and the decision of the Supreme court thereon shall be final and conclusive." It is clear from an examination of sub-divisions 1 and 2, of Section 2, Article 3 of the constitution of the United States, that as to such decree as may be rendered in controversies of this kind the jurisdiction of the Supreme Court of the United States is appellate only. Any act of Congress requiring the Supreme court to take original jurisdiction of such a matter would be unconstitutional and void.

But the section of the act creating the Court of Private Land Claims, above referred to, requires the Supreme court practically to try the cause the same as if it had originated in that court. It shall *re-try* the cause and on such retrial "*every question shall be open.*" The requirement that it shall re-try the cause upon the issues of fact and of law probably would not be obnoxious to its appellate jurisdiction if such retrial were limited to the record as it was made in the lower court; but when is added to this the requirement that the court shall cause additional testimony to be taken (for a proper showing having been made, this provision is undoubtedly mandatory) and that it shall re-hear and re-determine every question that may arise in the case the same as if it had not been litigated in the court below, a burden is imposed upon the Supreme Court of the United States not contemplated by the Constitution. The Congress of the United States cannot indirectly place a burden upon this Court that cannot be directly imposed under the Constitution. If it may say in a case of this nature that every question shall be open, and require of the Su-

preme Court that the cause shall be re-tried before it substantially as though it had never been tried, it can do so in any case at law or equity that may be litigated in the inferior federal courts. Under the provisions of this act the whole issue is open in this court; the parties are in nowise concluded by the proceedings in the lower court and may, if so advised, assume new positions here. The act simply affords a somewhat cumbersome method of getting a case into the Supreme Court where it is to be tried.

It will not do to say that this Court may entertain this appeal and dispose of it under the rules that would govern its procedure in equity causes that come by appeal from the inferior federal courts, because Congress has the right under the Constitution to prescribe the manner in which this Court shall exercise the appellate jurisdiction conferred upon it by the Constitution and having provided such rule the Court is bound to follow it. In Wiscart vs. Dauchy, 3 Dall. 321, Chief Justice Ellsworth, after stating the subjects of original jurisdiction of the Supreme court, says: "In all other cases, only an appellate jurisdiction is given to the court; and even the appellate jurisdiction is likewise qualified, inasmuch as it is given with such exceptions and under such regulations as the Congress shall make. Here then is the ground, and the only ground, on which we can sustain an appeal. If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided we cannot depart from it. The question, therefore, on the constitutional point of the appellate jurisdiction is simply whether Congress has established any rule for regulating its exercise?" But in this case Congress has provided a rule which is in contravention of the Constitution because it imposes on the court the bur-

den of re-trying the cause in its entirety. There is, therefore, no rule.

The Supreme Court is placed substantially in the same relation to the Court of Private Land Claims that the Federal District Court of California occupied in respect of the Board of Land Commissioners. In U. S. vs. Ritchie, 17 How., 525, it was "objected that the law prescribing an appeal to the District Court from the decisionof the Board of Commissioners is unconstitutional; as this board as organized is not a court under the constitution and cannot, therefore, be invested with any of the judicial powers conferred upon the general government." In answer to this Mr. Justice Nelson, speaking for the court, uses the following language: "But the answer to the objection is that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo* upon the papers and testimony which had been used before the board, they being made evidence in the district court; and also upon such further evidence as the party may see fit to produce."

So in Grisar vs. McDowell, 6 Wall., 363, the court by Mr. Justice Field, says: "The proceeding in the District Court, though called in the statute an appeal, was not in fact such. It was essentially an original suit in which new evidence was given and in which the entire case was open."

We submit that the language of the learned justices above quoted is applicable to the case at bar. A cause removed into this court from the Court of Private Land Claims is, by the provisions of the section authorizing such removal, "essentially an original suit" here.

"It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted and does not create that cause."

Marbury vs. Madison, 1 Cranch, 175.

But under the provisions of this act the power of the Supreme Court does not operate upon the proceedings of the Court of Private Land Claims. With its errors either in law or upon the facts, the Supreme Court has no concern; its judicial acts are not subjected to revision or correction; its decree receives no consideration—is not affirmed, reversed or modified; no mandate is directed to the inferior tribunal. The Supreme Court decides the whole matter finally and conclusively, regardless of the conclusions or findings of the Court of Private Land Claims, whose relation to the higher tribunal is simply that of a commission to take testimony.

We submit that this is the exercise of original not appellate jurisdiction.

E. M. SANFORD,
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S. L. CARPENTER,
For Appellee.